(24,045)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 353.

THE ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GENERAL BURNETTE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1914.

It further appears that on January 7th, 1910, General Burnett sued out a summons in the Superior Court of Edgecombe County, North Carolina, in an action for damages against the Atlantic Coast Line Railroad Company, arising out of the said personal injuries received October 5th, 1907.

That at the April Term, 1911, of said Superior Court, Honorable George W. Ward presiding, a trial was had and a special verdict of the jury rendered, fixing the amount of General Burnett's damages in said cause at $1,000.00, the liability of the Railroad Company having been admitted. No judgment was rendered, but by an agreement between the parties, the matter was left open to be further heard upon the law of the case, and a judgment signed at some subsequent term of court nunc pro tunc. The question being, was this acceptance of Relief Department benefits aforesaid a bar to the action or not.

At the March Term, 1913, of the Edgecombe County Superior Court, North Carolina, Honorable E. B. Cline presiding, it was decided by the Court and so adjudged that upon consideration
3 of the Federal statutes involved in the case, the decision of the Supreme Court of the United States in Philadelphia, Baltimore and Washington Railroad vs. Schubert 224 U. S. 603 and other cases, the plaintiff, said General Burnett, was not entitled to recover damages of the Railroad Company and that he take nothing by his writ and go without day.

The plaintiff, the said General Burnett, thereupon appealed from this judgment to the Supreme Court of North Carolina, which appeal was allowed by this Honorable Court, and the judgment of the lower court reversed in an opinion handed down on the 24th day of September, 1913, as aforesaid.

That in this action and in the judgment rendered therein in this court there was drawn in question the construction of certain statutes of the United States and the decision of this court was against the title and right of the Atlantic Coast Line Railroad Company, appellee and petitioner herein, and contrary to the said statutes of the United States, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, the said Atlantic Coast Line Railroad Company, petitioner, respectfully prays that a writ of error may issue to the Supreme Court of the State of North Carolina, for the correcting of the errors complained of, and that a duly authenticated transcript of the records and proceedings herein may be sent to the United States Supreme Court.

ATLANTIC COAST LINE RAILROAD COMPANY,
By F. S. SPRUILL, *D. C.*

4 In the Supreme Court of the State of North Carolina.

GENERAL BURNETTE, Appellant,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

Comes now the Atlantic Coast Line Railroad Company, the Appellee above named, by its Counsel, on the 8th day of January 1914, and files and presents to this Court its petition, praying for the allowance of a writ of error intended to be urged by it; and praying further that a duly authenticated transcript of the records, proceedings, and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court, desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, it is ordered by this court that writ of error be allowed, as prayed, and that on account of the agreement of Counsel for General Burnette, Appellant, which said agreement is made a part of the record, the said Atlantic Coast Line Railroad Company, Appellee and Petitioner, need give no bond according to law.

In testimony whereof, witness my hand this 8th day of January, A. D. 1914.

WALTER CLARK,
Chief Justice of the Supreme Court
of the State of North Carolina.

5 In the Supreme Court of the United States.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error,
vs.
GENERAL BURNETTE, Defendant in Error.

Assignment of Error- on Writ of Error to the Supreme Court of North Carolina.

Comes now the Atlantic Coast Line Railroad Company, plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause, the Supreme Court of North Carolina erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the rights of the said plaintiff in error, in the following particulars, to-wit:

First. That the said Supreme Court of North Carolina erred in ruling that an Act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases", approved April 22, 1908, and amended April 5th, 1910, familiarly known as the "Employers' Liability Act of 1908" was applicable to this case, the cause of action herein having arisen, as shown by the record, on October 5th, 1907.

Second. That the said Supreme Court of North Carolina erred in its construction of Section 6, of an Act of Congress entitled "An Act Relating to the Liability of Common Carriers by railroad to their Employees in Certain Cases", approved April 22nd, 1908, and amended April 5th, 1910, familiarly known as the "Employers' Liability Act of 1908", in holding that the two years' limitation in said Section 6, is a statute of limitation, and therefore required to be plead; and not a part of the right conferred by the statute and a condition inherent in, and annexed to the right of action, and not required to be plead, and which is therefore a bar to this
6 action, the cause of action herein having arisen October 5th, 1907, and the said action having been commenced January 7th, 1910, both as shown by the record.

Third. That the said Supreme Court of North Carolina erred in reversing the judgment of his Honor, Judge Cline, rendered at the March Term of the Edgecombe County, North Carolina, Superior Court, and in denying to this plaintiff in error its rights, privileges and immunities under the Constitution and laws of the United States.

Wherefore for these and other manifest errors appearing in the opinion of the said Supreme Court of North Carolina in the within cause, the said Atlantic Coast Line Railroad Company, plaintiff in error, by its Counsel, prays that the judgment of the said Supreme Court of North Carolina be reversed and set aside, and held for naught, and that judgment be rendered for the plaintiff in error, granting it its rights under the Constitution and laws of the United States and affirming the judgment rendered in this cause by his Honor, Judge Cline, at the March 1913 Term of the Edgecombe County, North Carolina, Superior Court.

ATLANTIC COAST LINE RAILROAD COMPANY,
By F. S. SPRUILL.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of North Carolina, before you, at the September 24th, sitting of the Fall Term, 1913, thereof, being the highest court of law or equity of the said State, in which a decision could be had in the said cause between General Burnett, plaintiff and appellant, and the Atlantic Coast Line Railroad Company, defendant and appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity, or wherein was drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under

the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Atlantic Cast Line Railroad Company; as by its petition appears.

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
8 writ, so that you have the same in the said Supreme Court at Washington, District of Columbia, within 30 days from the date hereof, towit on Feb'y 5, 1914, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 8th day of January in the year of our Lord, One Thousand Nine Hundred and Fourteen.

Done in the City of Raleigh and County of Wake, State of North Carolina, with the seal of the District Court of the United States for the Eastern District of North Carolina, attached.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

ALEX. L. BLOW,
Clerk of the District Court of the United States for the Eastern District of North Carolina.

Allowed by

WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States to General Burnette (by his Attorney, R. T. Fountain), North Carolina, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, towit on February 5th 1914, pursuant to the writ of error, filed in the office of the Clerk of the Supreme Court of North Carolina, wherein the Atlantic Coast Line Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of North Carolina, this 8th day of January, 1914.

WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of the State of North Carolina.

Service of this citation accepted, — day of ——, 1914.

R. T. FOUNTAIN AND
G. M. T. FOUNTAIN,
Solicitors for Defendant in Error.

10 NORTH CAROLINA,
Edgecombe County:

In the Superior Court, October Term, 1913.

GENERAL BURNETT
vs.
ATLANTIC COAST LINE RAILROAD COMPANY.

I, R. T. Fountain, Attorney of record for General Burnette, in the above entitled action, upon which judgment was rendered in the Superior Court of Edgecombe County for Nine Hundred and Four Dollars, principal money and costs, in accordance with the opinion and judgment of the Supreme Court of North Carolina, do hereby consent that the defendant company need not give a supersedeas bond to stay execution of said judgment during the pendency of said entitled case in the Supreme Court of the United States, to which Tribunal the said case has been taken by writ of error.

This the 14th day of November, 1913.

R. T. FOUNTAIN &
G. M. T. FOUNTAIN,
Attorney- of Record for Plaintiff, General Burnett.

G. B. E.
F. S. S.

11 GENERAL BURNETTE
against
ATLANTIC COAST LINE RAILROAD COMPANY.

(From Edgecombe.)

NORTH CAROLINA,
Edgecombe County:

In the Superior Court.

Be it remembered that at a Superior Court begun and held for the county of Edgecombe at the court-house in Tarboro, N. C., on the

4th Monday after the 1st Monday in March, 1911, it being the 1st day of April, 1911, his Honor G. W. Ward, Judge of the First Judicial District, present and holding the same, when the following proceedings in the case of General Burnette vs. Atlantic Coast Line Railroad Company, are had, to wit:

Application to Sue as Pauper.

NORTH CAROLINA,
Edgecombe County:

In the Superior Court.

GENERAL BURNETTE
vs.
ATLANTIC COAST LINE RAILROAD COMPANY.

To the Honorable Clerk of the Superior Court of Edgecombe County:

This is to certify that I have examined the case of plaintiff in the above-entitled action, and believe that he has good and meritorious cause of action.

RICHARD T. FOUNTAIN, *Attorney.*

12 NORTH CAROLINA,
Edgecombe County:

General Burnette being duly sworn, says that he is unable to give sureties or make the deposit required by law, to enable him to prosecute the above action against the defendants, Atlantic Coast Line Railroad Company, and therefore prays that he may be allowed to sue in said action as a pauper.

GENERAL BURNETTE.

Sworn before me this the 27th day of December, 1909, at Florence, South Carolina.

[NOTARIAL SEAL.]

J. E. SCHOUBOE,
Notary Public.

Order Granting Leave to Sue as a Pauper.

NORTH CAROLINA,
Edgecombe County:

In the Superior Court.

In the above-entitled action, upon the certificate and affidavit above set forth, it is ordered:

First. That the above named General Burnette be allowed to prosecute his said suit as a pauper.

Second. That R. T. Fountain be assigned to represent him as counsel to prosecute said action.

This 7th day of January, 1910.

A. T. WALSTON,
Clerk of the Superior Court.

13 *Summons for Relief.*

NORTH CAROLINA,
Edgecombe County:

In the Superior Court.

(Title of Cause.)

State of North Carolina to the Sheriff of Edgecombe County, Greeting:

You are hereby commanded to summon Atlantic Coast Line Railroad Company, the defendant above named, if it be found within your County, to be and appear before the Judge of our Superior Court, at a Court to be held for the County of Edgecombe at the Court House in Tarboro, N. C., on the first Monday in March, 1910, and answer the complaint which will be deposited in the office of the Clerk of the Superior Court of said County, within the first three days of the Term, and let the said Defendant take notice that if it fail to answer the said complaint within that term, the Plaintiff will apply to the Court for the relief demanded in the complaint, and the cost of this action to be taxed by the Clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said Court, this 7th day of January, 1910.

[SEAL.] A. T. WALSTON,
Clerk Superior Court Edgecombe County.

Received January 8th, 1910. Served January 11th, 1910, by reading to and leaving a copy of the within summons with T. F. Marrow, Agent of the Atlantic Coast Line Railroad Company, the defendant therein named.

B. F. DAWSON,
Sheriff Edgecombe County.

14 *Complaint.*

NORTH CAROLINA,
Edgecombe County:

In the Superior Court, March Term, 1910.

(Title of Cause.)

The plaintiff complaining of the defendant alleges:

1.

That the defendant is a duly incorporated Railroad Company under and by virtue of the laws of the State of North Carolina, doing the business of a common carrier of freight and passengers,

and was at the time of the injury hereinafter complained of, so operating in said State.

2.

That on and before the 5th day of October, 1907, the plaintiff was employed by the defendant as fireman on one of the defendant's locomotive engines, and on the 5th day of October was assigned to the duties of fireman on one of defendant's fast passenger trains, known as number eighty-two, running from Florence, South Carolina, to Rocky Mount, North Carolina. That it is the duty of said defendant to keep its track in thorough repair, and in a safe condition, and to see that all switches to side tracks are closed, and the track cleared of all obstructions.

3.

That on the night of the fifth day of October, 1907, the plaintiff while in the discharge of his duty, as fireman, on defendant's train number eighty-two, which train was running from Florence, South Carolina, to Rocky Mount, N. C., said train ran into a switch which, was negligently left open by said defendant, said switch leading to a side track in the railroad yards at South Rocky Mount, and in the suburbs of Rocky Mount, S. C., and caused said train to run into a train which was stationed on said side track, which knocked
15 the engine on which plaintiff was firing off the track; said engine falling on plaintiff and the engineer; said engineer being killed, and the plaintiff was thereby seriously injured in his legs and body and received serious injuries on his head and suffered great bodily pain and mental anguish, and was put to much expense, as he was under the care of a physician for several months, and at times now; and has not yet recovered from said injury.

4.

That by reason of defendant's negligence in not having its switch closed as it should have been, and as it was its duty to do, and its track clear of all obstructions, aforesaid plaintiff was seriously and permanently injured as aforesaid, and has suffered great damage to wit; the sum of Seven Thousand ($7,000.00) Dollars.

Wherefore the plaintiff demands judgment for the sum of Seven Thousand ($7,000.00) Dollars, and the costs of this action.

G. M. T. FOUNTAIN AND
RICHARD T. FOUNTAIN,
Attorneys for Plaintiff.

SOUTH CAROLINA,
Florence County:

General Burnette being duly sworn, says that the facts stated in the above complaint are true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

GENERAL BURNETTE.

Subscribed and sworn to before me this the 8th day of February, 1910.

[NOTARIAL SEAL.] J. E. SCHOUBOE,
Notary Public.

My commission expires at the pleasure of the Executive.

16 *Answer.*

NORTH CAROLINA,
Edgecombe County:

In the Superior Court, March Term, 1910.

(Title of Cause.)

The defendant, answering the complaint filed in this action, says:

1. That the allegations of paragraph one of the complaint are admitted.

2. That the allegations of paragraph two of the complaint are admitted.

3. That so much of paragraph three of the complaint as alleges that the plaintiff "was seriously injured in his legs and body, and received serious injuries on his head and suffered great bodily pain and mental anguish, and was put to much expense; that he was under the care of a physician for several months and at times now, and has not yet recovered from said injury," is not true and is denied. The remaining part of said paragraph is admitted.

4. That the allegations of paragraph four of the said complaint are not true, and are denied.

And for another and further answer to said complaint, the defendant says:

1. That heretofore, to wit: prior to the institution of this action, realizing the hazardous nature of the employment of many of its servants, agents and employees, and the liability to injury and sickness attendant upon such employment, and realizing further the fact that accident or health insurance for such employees so engaged in said hazardous employment was expensive to such a degree that many of said employees could not afford to pay the premiums demanded by the insurance companies, this defendant determined to form, and did form together with such of its employees as voluntarily desired to join it, a mutual benefit department of its service,
called the "Relief Department," which said department it has
17 continued to operate since the formation thereof, for the purpose of aiding its employees to obtain protection at reasonable rates in the form of benefits in case of injury or sickness, and of definite payments of money to their families in case of death; that the object of said department was then and still is, to create and maintain a fund, to be known as the relief fund, out of which to pay definite amounts of money to the employees participating in said relief department, under certain rules and regulations, hereinafter set

forth and described, in the event of injury or sickness, and the payment of a certain definite sum to the families of such employees in case of death either from sickness or accident, or from other causes.

The defendant further says that prior to the date on which the said relief department was put in operation on its road, it adopted, under authority of its board of directors, certain rules and regulations, or by-laws, hereinbefore referred to, setting forth the nature and purpose of said department, the manner in which it was conducted, the method of raising funds, the manner in which employees might become members, their rights, duties and obligations while remaining members of said department, and amount of benefits and manner of paying benefits, and the rights, duties and obligations of this defendant with respect thereof. A copy of said regulations, rules or by-laws as they were revised to take effect on April 1st, 1904, is hereto attached, marked Ex. A, and asked to be *be* made a part of this answer. The defendant says that the said regulations provide that a fund shall be raised by the said relief department for the payment of certain benefits to said employees who become members of said department; said fund to be raised by monthly contributions of said members, by income derived from investments, by interest on all such contributions paid in, to be paid by the defendant herein, and by appropriations made by said defendant whenever necessary.

Said regulations further provide that the said defendant shall
18 at all times guarantee to the said relief department and to the members thereof, that the said fund shall be sufficient in amount to meet all demands upon it under said regulations, and that it will, at any and all times, make up, by appropriations from its own moneys, any deficiency in said fund; that the said defendant shall pay interest at the rate of four per cent per annum on all monthly balances constituting said fund in its hands, and that it shall supply, without cost or expense to the said relief department, the necessary facilities for conducting the business thereof, the necessary officers, including a superintendent, assistant superintendent and chief surgeon, the necessary clerical forces, and that it shall pay out of its own moneys, without expense to the said relief department, all of the expenses of operation of said department. Said regulations further provide that the said defendant shall receive and care for said contributions, constituting said fund, and shall hold the same in trust for the use and benefit of said department and its members, paying interest on all monthly balances in its hands as aforesaid.

This defendant further says that any of its said employees desiring to join said department will be permitted to do so upon the terms and conditions set forth in said regulations; that upon joining said department, said employees enter into and execute an agreement in writing with said relief department and with this defendant, whereby it was and is, among other things, provided that such employees shall contribute to said fund a certain definite amount each month, which said amount shall be deducted from the wages or salary earned by such employee, and that certain definite benefits shall be paid to said employees in case of disability due to sickness or injury, and that certain definite amounts shall be paid to such

member of his family or to such other person as he shall designate in writing, in the event of his death. It is further provided by said contract that in the event said employee shall thereafter be injured while engaged in the performance of his duty as an employee of said defendant, he may, after receiving said injury, elect to accept the benefits provided by said regulations in full settlement
19 and satisfaction of his claim against said department, and in release of any claim that he may have against this defendant on account of said injury; or, in lieu thereof, he may elect to relinquish his rights to said benefits and institute a claim or action at law against this defendant for such sum as he may be entitled to by reason of his said injuries. The said contract further provides that in the event of injury resulting in death to such employee, the person named by him in said contract as his beneficiary shall be entitled to receive the benefits provided by said regulations, upon securing and delivering to the defendant company and to the relief department a release in writing executed by the person or persons entitled to maintain an action against said company on account of the death of said employee. This defendant further says that said members need not, under the terms of said contract, make the election provided for therein until after such injury is received, and until such member has had full opportunity to consider his rights at law against said company, and to receive such advice as he deems necessary. This defendant further says that in consideration of said agreement by said employee upon becoming a member of said department, it undertakes and agrees to pay all of the operating expenses of said department, including salaries of its said officers and clerk hire, and further undertakes and agrees to guarantee that the said relief fund shall at all times be sufficient to meet all demands upon it under said regulations.

2. This defendant further says that the plaintiff in this action, General Burnette, became an employee of the defendant as a fireman on its railroad, prior to the fifth day of October, 1907; that he was eligible to membership in said relief department; that he made voluntary application in writing in due and legal form, to become a member of said relief department under the terms of which application he solemnly agreed to the terms and conditions of said contract hereinbefore referred to, and further agreed to be bound by all the regulations of said department. A copy of said application
20 is hereto attached, marked Exhibit B, and asked to be made a part of this answer; that pursuant to said application, the said plaintiff was heretofore, to wit: prior to the fifth day of October, 1907, duly admitted to membership in said relief department, and a certificate of membership was delivered to said plaintiff, likewise prior to said date.

That the said General Burnette, the plaintiff herein, became a member of said relief department of the second class, and remained a member thereof until on or about the tenth day of January, 1908; and that pursuant thereto he was entitled to membership under the terms of said contract entered into between the plaintiff, the said relief department and this defendant, as hereinbefore set forth and averred. The defendant further says that, pursuant to its obliga-

tions set forth and created by said regulations and as hereinbefore set out, it has maintained and kept up the said relief department and has paid from its own moneys all the expenses of operating and maintaining the same, including office rent, official salaries, clerk hire, stationery, printing, fuel, light, travelling expenses of chief surgeons, numerous medical examiners, and a large number of other expenses too numerous to mention in detail; that it still continues to pay such expenses, amounting to over forty thousand dollars per annum in the aggregate. This defendant further says that it has paid out of its own money for operating expenses for said relief department, to October thirty-first, 1907, the sum of $239,300.01; that this sum does not include office rent for the relief department nor office rent for the medical examiners, does not include the expense of light, fuel, telegraph service, mail and express service, or free transportation of officers and employees of said relief department; that it does not include the services of the officers of this defendant, nor the services of the clerks of this defendant rendered in behalf of said department in cases where the services of such officers or clerks are not devoted wholly to the relief department, a large amount of which is being furnished by the defendant,
21 which said services are additional expense and are approximately four thousand dollars per annum. The defendant further says that in addition to the said regular expenses paid by it, and to the incidental expenses and services hereinbefore referred to, it has at its own cost furnished the land for the necessary number of hospitals, and has built thereon, and equipped, hospitals for the accommodation and service of the relief department and for the use of the members of said department, the cost of said buildings and equipment being $71,318.17.

This defendant further says that by reason of its payment of all the operating expenses and its guaranty that said relief fund shall be sufficient, the rate of contribution of its members is permanently fixed, and is reduced to about one half of what the commercial insurance companies would charge for the same amount of benefits to a person in the same class of employment; that in commercial accident insurance companies at least one half of what is paid in to said companies by way of premiums is used by said companies in the payment of expenses of operation; that the payment of all such expenses of operation of said relief department by this defendant enables the said department to charge as premiums only about fifty percent of what commercial insurance companies would charge, as hereinbefore set forth. The defendant also says that from the time of its organization up to the present time a large amount of money has been paid out from the relief fund to employees who have been members of it or for their benefit, to wit: the sum of $975,097.44; that it paid for sickness and death from sickness, $600,093.87, and for benefits for injury and death resulting from injury, $263,816.97, and for maintenance of hospitals $111,086.60.

The defendant further says that it is advised that on or about the fifth day of October, 1907, at or on its yards at South Rocky Mount, North Carolina, the plaintiff in this action was accidentally

hurt, although said injury was not serious nor permanent
22 in its results; that said plaintiff was entitled, under the terms of his contract of membership in said relief department, to the benefits provided by said regulations, from the fifth day of October, 1907, at the rate of one dollar per diem during the continuance of the disability occasioned by said accident and injury, for the term of ninety-seven days thence next ensuing; and thereafter, having been adjudged by the surgical staff of said relief department well and capable of returning to his work, his right to benefits under and from the relief according to the terms of his said contract terminated.

3. This defendant further says that after said injury, pursuant to his contract of membership and to the regulations of the relief department, the said General Burnette, the plaintiff herein, was entitled to elect between the right to receive benefits from said department and the right to bring suit against the defendant on account of said injury; that pursuant to his said right of election, the said plaintiff, General Burnette, did solemnly make and execute his said election, and did receive and accept under said regulations an aggregate sum of ninety-seven dollars, said payments being made under the terms of said regulations, by drafts or checks on said relief fund. Copies of said drafts or checks are hereto attached, marked Exhibits 1 and 2, and asked to be made parts of this answer.

4. This defendant alleges that by reason of the execution of the election provided in said contract and the regulations of said department, and of the acceptance, pursuant to said election, of said benefits by said plaintiff, the said plaintiff did solemnly release and fully discharge and end all claim or claims, suits or demands against the defendant which the said plaintiff may or might have had on account of his said injuries; and that the payment of said benefits pursuant to said election constitutes a full settlement and satisfaction of and for any and all such claim or claims against said defendant in accordance with the provisions of the regulations of said department.

23 Wherefore, the defendant prays that this action be dismissed at the cost of plaintiff, and that the defendant be allowed to go hence without day.

JNO. L. BRIDGERS,
F. S. SPRUILL,
Attorneys for Defendant.

NORTH CAROLINA,
Nash County:

W. H. Newell, being first duly sworn, says that he is an officer, to wit: General Superintendent of the First Division, of the defendant Atlantic Coast Line Railroad Company above named; that he has read the foregoing answer and knows the contents of the same; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

W. H. NEWELL.

Sworn to and subscribed before me, this 27th day of October, 1910, as witness my hand and notarial seal. My commission expires on the 29th day of January, 1911.

[NOTARIAL SEAL.] T. H. LACY,
Notary Public.

At said April Term, 1911, of said Superior Court, so held by Hon. Geo. W. Ward, Judge as aforesaid of the Superior Court of North Carolina, a jury was duly drawn, sworn and impaneled, to whom was submitted, without objection, one issue as follows, to wit: "What damage has plaintiff sustained on account of injuries received as alleged in the complaint?"

The submission of other issues raised by the pleadings was rendered unnecessary by the admission in open Court by counsel
24 for defendant company of its negligence and by the admission on the part of counsel for plaintiff all and each of said allegations of fact contained in the defendant company's further answer. Of the last named admission, the following note or memorandum was made in writing by the presiding Judge and filed with the judgment roll in the case, to wit: "It is agreed that the facts set out in the further answer by the defendant are true, but the conclusions of law therein are not admitted by the plaintiff but contended that the contract is invalid as matter of law."

It was agreed in open court by the plaintiff and defendant that upon the verdict, to be submitted to the jury as above, no judgment at that term of the court was to be rendered by the Judge, but that, after the coming in of the verdict, the case was to be left open to be further heard upon the defences set up and made in the defendant's further answer, and that judgment should be signed, for plaintiff or defendant, as the court should be of opinion, at a subsequent term of the Court Nunc Pro Tunc. The facts in respect of said agreement and the reasons for making it are truly and fully set forth in the final judgment which was subsequently and after full argument, rendered by Hon. E. B. Cline, Judge, and which is contained hereinafter.

The jury answered the issue submitted to it as above set forth: "One thousand ($1,000.00). Dollars."

And be it remembered further that at a subsequent term of said Superior Court, to wit: The term begun and held for the said County of Edgecombe in the Court House at Tarboro, N. C., on the fourth Monday after the first Monday in March 1913, it being the 31 day of March, 1913, to which the said civil action of General Burnette vs. Atlantic Coast Line Railroad Company had been, in the regular order of the Court, from term to term, duly and formally continued, his Honor, E. B. Cline, Judge of the Thirteenth Judicial District of North Carolina, present and holding the same, the
25 following further proceedings in said case of General Burnette vs. Atlantic Coast Line Railroad Company were had, to wit: "The Court, after hearing the pleadings, agreement of counsel, memorandum of Hon. Geo. W. Ward, and arguments, made and entered judgment as follows; viz:

Judgment.

NORTH CAROLINA,
Edgecombe County:

In the Superior Court, March Term, 1913.

(Title of Cause.)

This cause came on originally to be heard before his Honor, Geo. W. Ward, Judge, and a jury, at the — term 1911, of Edgecombe Superior Court. At that time the question of whether or not the plaintiff was injured by the negligence of the defendant, and if so, the amount of damage sustained by him, was submitted to the jury; and the jury found the issue of negligence in favor of the plaintiff, and fixed his damages at $1,000.00. No judgment was rendered upon the verdict, but by agreement the matter was left open to be further heard, and judgment signed at some subsequent term of court nunc pro tunc. The reason for deferring judgment, (as stated to the Judge rendering this judgment), was that at said former term one or more cases were pending in the Supreme Court of North Carolina, the decision of which would aid the lower court in a determination of the case at bar.

The plaintiff Burnette insisted that, admitting the facts set out in the defendant's further answer, he was nevertheless entitled to judgment, the defendant insisting that, taking the facts stated therein to be true, it was entitled to judgment that it go hence without day, etc. Thereupon it was agreed that the facts set forth in the further answer by the defendant were true, but the conclusions of law therein were not admitted by the plaintiff. The plaintiff further contending
that the contract called the Relief Department was invalid as
26 matter of law; and Judge Ward made an entry on his notes
of this admission and contention. It was further understood and agreed between the parties that the expression in paragraph three of the further answer "That the plaintiff did solemnly make, and execute his said election, and did receive and accept under said regulations an aggregate sum of $97.00," should only be taken as a statement of fact to mean that he did receive checks or drafts aggregating $97.00 from the Relief Fund, under the terms of his membership in said Relief Department, and cashed and used them.

The cause was placed upon the motion docket at the March Term, 1913, and came on to be heard before his Honor E. B. Cline, Judge Presiding, upon motion of both plaintiff and defendant for judgment in favor of each respectively. It was agreed that if the facts stated in the further answer in regard to the Relief Department, and the things done in connection therewith, or not done, by both parties were not a bar to recovery by plaintiff in this case, then the Court was to render judgment in his favor for $1,000.00 and costs, but if they constituted a bar to a recovery by him, then the judgment was to be rendered in favor of the defendant.

The Court did not understand that the verdict of the jury was to

determine the matter other than to find the negligent act and the amount of damages, if any, were recoverable. Upon the argument before the undersigned the plaintiff insisted upon the rendition of a judgment in his favor both under the Acts of Congress as well as under the State law. The defendant insisted that the Federal Statutes were not applicable, and that it was entitled to judgment under the decision of King vs. Railroad 157 North Carolina, 44, and other decided cases.

Treating the facts set forth in the further answer as true, except as qualified above, and which are made a part of this judgment, as fully as though they were set forth herein, the Court, upon consideration of Federal Statutes, the decision of the Supreme Court of the United States, in the case of Philadelphia, Baltimore and Washington R. R. Co. vs. Schoubert, 59 L. Ed. (222-225) page 911,
27 and other cases, is of the opinion that they cannot aid the plaintiff to a recovery.

As the Court understands the application of the decision in King vs. Railroad, supra, to this case, the plaintiff under the facts appearing in the further answer is estopped and precluded from a recovery against the defendant in this action.

It is therefore considered and adjudged that the plaintiff is not entitled to recover, that he take nothing by his writ, and that the defendant go hence without day.

E. B. CLINE,
Judge Presiding.

Plaintiff excepts and appeals to the Supreme Court. Notice of appeal waived. By consent is agreed by plaintiff & Defendant that the Record proper and the judgment of the Court shall constitute the case on appeal; plaintiff allowed to attach his summary of exceptions.

CLINE, *Judge.*

R. T. FOUNTAIN,
Att'y — Plaintiff.
F. S. SPRUIL,
Att'y — Defendant.

Affidavit.

NORTH CAROLINA,
Edgecombe County:

(Title of Cause.)

General Burnette being duly sworn deposes and says; that he is unable by reason of his poverty to give the security required by law to appeal to the Supreme Court of North Carolina, and that he is advised by counsel learned in the law, that there is error in matter of law in the decision of the superior court in said action.

GENERAL BURNETTE.

Subscribed and sworn to before me this the 8th day of October, 1912.

[NOTARIAL SEAL.] CHAS. M. McCURRY,
Notary Public.

28 (*Certificate.*)

NORTH CAROLINA,
Edgecombe County:

In the Superior Court, April Term.

I, R. T. Fountain, a practicing attorney of the Superior Court of Edgecombe County, do hereby certify that I have examined the affidavits carefully and that I am of the opinion that the decision of the Superior Court, in said action is contrary to law.

R. T. FOUNTAIN, *Attorney.*

Order.

NORTH CAROLINA,
Edgecombe County:

(Title of Cause.)

Upon affidavit of plaintiff and certificate of counsel being duly filed it is ordered that the plaintiff be allowed to appeal the above entitled case to the Spureme Court of North Carolina in Forma pauperis.

This the — day of ——, 1913.

E. B. CLINE,
Judge Presiding.

Assignment of Error.

NORTH CAROLINA,
Edgecombe County:

(Title of Cause.)

The plaintiff, General Burnette, groups *its* exceptions and assigns errors as follows:

Exception No. 1.

29 For that the Court refused to give judgment in favor of the plaintiff for $1,000.00.

Exception No. 2.

For that the Court signed a judgment as set out in the record.

30 NORTH CAROLINA,
Edgecombe County:

I, A. T. Walston, Clerk of the Superior Court in and for the State and County aforesaid, do certify that the foregoing is a true copy of the records in the case of General Burnette vs. Atlantic Coast Line Railroad Company, (except the title of the action omitted, and the entries of appeal, which were agreed upon by counsel for plaintiff and defendant), now pending in said Court.

Witness my hand and official seal this the 14th day of August, 1913.

A. T. WALSTON,
Clerk Superior Court.

31 No. 43923. $26.00.

Atlantic Coast Line Relief Department.

No Protest.

WILMINGTON, N. C., Dec. 14, 1907.

Pay to the order of General Burnette (Certificate No. 1707) Twenty-six Dollars And charge to the Relief Fund of the Relief Department of the Atlantic Coast Line Railroad Company. This amount is in payment of benefits for accident disability for 26 days from Oct. 6, 1907, to Oct. 31, 1907, inclusive and is paid and accepted under the Regulations of the Relief Department.

G. G. THOMAS,
Superintendent.

To the Treasurer of the Atlantic Coast Line Railroad Company, Wilmington, N. C.

Copy.

No. 45322. $71.00.

Atlantic Coast Line Relief Department.

No Protest.

WILMINGTON, N. C., Feb. 17, 1908.

Pay to the order of General Burnette (Certificate No. 1707) Seventy-one Dollars. And charge to the Relief Fund of the Relief Department of the Atlantic Coast Line Railroad Company. This amount is in payment of benefits for Accident disability for 71 days from Nov. 1, 1907 to Jan. 10, 1908, inclusive, and is paid and accepted under the Regulations of the Relief Department.

G. G. THOMAS,
Superintendent.

To the Treasurer of the Atlantic Coast Line Railroad Company, Wilmington, N. C.

Copy.

(Exhibits 1 & 2.)

32 *Docket Entries.*

Appeal docketed August 16, 1913.
Argued September 3, 1913.
Opinion by Allen, J., filed September 24, 1913, as follows:

33 Supreme Court of North Carolina, August Term, 1913.

55. Edgecombe.

GENERAL BURNETT, Appellant,
v.
ATLANTIC COAST LINE RAILROAD COMPANY.

This is an action to recover damages for personal injury caused by the negligence of the defendant, and the only defense relied on is that the plaintiff has, since his injury, accepted benefits from the Relief Department.

No statute of limitations has been pleaded, but it is admitted that this action was commenced more than two years after the injury. It was further admitted that the complaint alleges a cause of action under the Federal Employers' Liability Act, and that that act is applicable to this case, the point in controversy being whether section six of the Act is a condition imposed upon the right of action or a statute of limitation.

The facts are set out in the judgment appealed from, except it is inadvertently stated therein that an issue of negligence was submitted to the jury, when the pleadings show that negligence was not denied, and the only controverted fact was the amount of damages.

The judgment is as follows:

"This cause came on originally to be heard before his Honor, Geo. W. Ward, Judge, and a jury, at the —— term, 1911, of Edgecombe Superior Court. At that time the question of whether or not the plaintiff was injured by the negligence of the defendant and if so, the amount of damages sustained by him, was submitted to the jury; and the jury found the issue of negligence in favor of the plaintiff, and fixed his damages at $1,000.00. No judgment was rendered upon the verdict, but by agreement the matter was left open to be further heard, and judgment signed at some subsequent term of court nunc pro tunc. The reason for deferring judgment, (as stated to the judge rendering this judgment) was that at said former term one or more cases were pending in the
34 Supreme Court of North Carolina, the decision of which would aid the lower court in a determination of the case at bar.

The plaintiff Burnette insisted that, admitting the facts set out in the defendant's further answer, he was nevertheless entitled to judgment, the defendant insisting that, taking the facts stated therein to be true, it was entitled to judgment that it go hence with-

out day, etc. Thereupon it was agreed that the facts set forth in the further answer by the defendant were true, but the conclusions of law therein were not admitted by the plaintiff. The plaintiff further contending that the contract called the Relief Department was invalid as a matter of law; and Judge Ward made an entry on his notes of this admission and contention. It was further understood and agreed between the parties that the expression in paragraph three of the further answer, "That the plaintiff did solemnly make and execute his said election, and did receive and accept under said regulations an aggregate sum of $97.00," should only be taken as a statement of fact to mean that he did receive checks or drafts aggregating $97.00 from the Relief Fund, under the terms of his membership in said Relief Department, and cashed and used them.

The cause was placed upon the motion docket at the March Term, 1913, and came on to be heard before his honor, E. B. Cline, Judge Presiding, upon motion of both plaintiff and defendant for judgment in favor of each respectively. It was agreed that if the facts stated in the further answer in regard to the Relief Department, and the things done in connection therewith, or not done, by both parties were not a bar to recovery by plaintiff in this case, then the court was to render judgment in his favor for $1,000.00 and costs, but if they constituted a bar to a recovery by him then the judgment was to be rendered in favor of the defendant.

The Court did not understand that the verdict of the jury was to determine the matter other than to find the negligent act and the amount of damages, if any, were recoverable. Upon the
35 argument before the undersigned the plaintiff insisted upon the rendition of a judgment in his favor both under the Acts of Congress as well as under the State law. The defendant insisted that the Federal statutes were not applicable, and that it was entitled to judgment under the decision of King v. Railroad, 157 North Carolina, 44, and other decided cases.

Treating the facts set forth in the further answer as true, except as qualified above, and which are made a part of this judgment, as fully as though they were set forth herein, the Court, upon consideration of Federal Statutes, the decision of the Supreme Court of the United States, in the case of Philadelphia, Baltimore and Washington R. R. Co. v. Schoubert, 59 L. Ed. (222-225), page 911, and other cases, is of the opinion that they cannot aid the plaintiff to a recovery.

As the Court understands the application of the decision in King v. Railroad, supra, to this case, the plaintiff under the facts appearing in the further answer is estopped and precluded from a recovery against the defendant in this action.

It is therefore considered and adjudged that the plaintiff is not entitled to recover, that he take nothing by his writ, and that the defendant go hence without day.

E. B. CLINE,
Judge Presiding."

The plaintiff excepted and appealed.

Fountain & Fountain, for plaintiff.
F. S. Spruill, for defendant.

ALLEN, *J.*:

It is settled beyond controversy by the decisions of the Supreme Court of the United States, that the acceptance of benefits from a Relief Department does not prevent a recovery of damages for negligence under the Employers' Liability Act of 1908 (Chicago
36 R. R. v. McGuire, 219 U. S. 549; R. R. v. Schubert, 224 U. S., 603), and as it is admitted that the Act is applicable to this case, the only question presented by the appeal is the construction of Sec. 6 thereof, which reads as follows: "That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

If this is a statute of limitation the defendant cannot avail itself of its protection, because of its failure to plead the statute, which is required both under our Revisal, Sec. 360, and under the general law (Wood on Limitations, Vol. 1 sec. 7) and on the other hand, if it is a condition inherent in and annexed to the right of action, the defendant was not required to plead it, and it would operate to defeat the plaintiff's action, which was commenced more than two years after the cause of action accrued.

The last principle is illustrated by the decisions in this State and elsewhere, under Lord Campbell's Act creating a right of action for wrongful death, and is the one invoked by the defendant.

It is true it has been generally held by the Courts that where the statute creates a right not known to the common law, and provides a remedy for its enforcement, and limits the time within which the remedy must be pursued, the remedy in such cases forms a part of the right, and if not invoked within the time both the remedy and the right are lost (Bear Lake Co. v. Garland, 164 U. S. 1; Negaubauer v. R. R., 104 Am. St. Rep. 674; Rodman v. R. R. 59 L. R. A. 706), but this view is not universally entertained, as it was held otherwise in Kaiser v. Kaiser, 16 Hun. 602, and the rule is at most a rule of construction adopted by the Courts to aid in ascertaining the intent of the Legislative body.

We must then examine the Act of Congress, and after considering its purpose, the subject with which it deals, the language used, and its effect, determine the legal operation of section six.

Again, we turn to the decisions of the Supreme Court of
37 the United States, and find that one purpose of Congress was to adopt a uniform rule operating alike on all employees of railroad companies engaged in interstate commerce, and that one of the effects of the statute is to supersede the laws of the States in so far as they cover the same field. Mondou v. R. R., 223 U. S., 51 and 53.

The Act includes within its terms all employees of railroad companies, injured by negligence, while employed in interstate commerce, and these may be divided into three or four classes for the purposes of this discussion.

In the first are those employees injured by the negligence of the company, when there is no assumption of risk, no contributory negligence, and no negligence of a fellow servant, and that there are such employees is exemplified by this record, from *from* which it

appears that the only fact in issue, or debated in this case, is the amount of damages.

The Act of Congress creates no right in this class of employees that did not exist at common law, as they had the right before the Act of Congress to maintain an action in the State Courts, to recover damages for injuries caused by negligence, and the usual limitation upon the exercise of this right was three years.

In the next class are those employees injured by the negligence of the company, who are guilty of contributory negligence. These are permitted to recover damages, which they could not do at common law, the Act introducing the doctrine of comparative negligence, instead of that of contributory negligence.

The change in the law as to contributory negligence confers no right, and is operative only to withdraw from the company a defense theretofore existing, and the same may be said as to changes in the doctrine as to the negligence of a fellow-servant, and of assumption of risk.

This seems to be the construction of the Act adopted by the Circuit Court of Appeals in Garrett v. R. R. 197 Fed. Rep., in which the Court says: "The damages allowed to the injured em-
38 ployee are but declaratory of rights existing at common law," and if correct, it may well be questioned whether the rule of construction relied on by the defendant has any application, but however this may be, the considerations suggested furnish reasons bearing upon the legal effect of Section six.

The Act supersedes the State law and thereby deprives employees of a right of action existing at common law. It is entitled "The Employers' Liability Act," and was enacted for the benefit and protection of employees. It was designed to make it easier for employees to recover damages for injuries caused by negligence, and not to impose conditions destructive, not of the remedy, but of the right.

If so, it seems to us more reasonable to conclude that in an Act of this character, having in view the establishment and maintenance of the rights of the employee, under just restrictions, and considering the different classes of employees affected, it was the intent of Congress to limit the time within which an action could be commenced, and not to destroy the right.

The physical separation of the provision as to time from the section defining the right of action, is also significant, and when considered in connection with the verbiage of section six, which is peculiarly adapted to a statute of limitations, becomes, without other considerations, almost controlling.

The language of the section is strictly within the definition of a statute of limitation. Mr. Wood says in his work on limitations (Vol. 1, sec. 1): "Statutes of limitations are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced. Statutes which provide that no action shall be brought or right enforced, unless brought, or enforced within a certain time, are statutes of limitations," and in Upton v. McLaughlin, 105 U. S. 640, a statute in the following words was held to be a statute of limita-

tions: "No suit, either at law or in equity, shall be main-
39 tained in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferrable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The decisions of our court upon the provision as to time in the Act conferring a right of action for wrongful death (Rev. — Sec. 59) in nowise conflicts with the position that Section six of the Employers' Liability Act is a statute of limitation, because the Act referred to clearly confers a new right of action not existing at common law, the language used is not that ordinarily found in statutes of limitations, and the limitation as to time is a part of the section defining the right of action, and is made a part of it.

The statute reads: "Whenever the death of a person is caused by a wrongful act * * * the person or corporation * * * shall be liable to an action for damage, to be brought within one year after such death."

The case of Dockery v. Hamlet, 162 N. C. (78 S. E. Rep. 13) is also called to our attention, in which it was held that the limitation of the time within which a claim against a county, city or town could be presented, was not a statute of limitation. The decision in that case was made upon the authority of Wharton v. Comrs., 82 N. C. 14, and the Court was not advertent to the fact that when the Wharton case was decided, the statute in question was a part of the chapter regulating County Revenue, and that since then it has been made a part of the Statute of Limitations by express legislative act, and is now section 396 Sub-sec. 1 of the Revisal.

The case of King v. Railroad, 157 N. C. 44, has no application, because it was decided under the principles of the comomn law, and this case is governed by the Federal Statute.

After full consideration we are of opinion that the sixth section of the Employers' Liability Act is a statute of limitations, and that there is error.

40 The plaintiff is entitled to judgment upon the verdict for the amount of damages awarded, less $97.00 received by him from the Relief Department, which the statute says must be deducted.

Error.

Brown, J. did not sit and took no part in the decision of this case.

41 *Judgment.*

Supreme Court of North Carolina, August Term, 1913.

#55. Edgecombe.

GENERAL BURNETTE
vs.
ATLANTIC COAST LINE RAILROAD COMPANY.

This cause came on to be argued upon the transcript of the record from the Superior Court of Edgecombe County. Upon consideration whereof this Court is of opinion that there is error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court as delivered by the Honorable W. R. Allen, Justice, be certified to the said Superior Court to the intent that proceedings be had therein in said cause according to law.

And it is considered and adjudged further, that the defendant do pay the cost of the appeal in this Court incurred, towit, the sum of Fifteen 40/100 Dollars ($15.40), and execution issue therefor.

42 *Certificate.*

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record on file in this Court in the case of General Burnette against Atlantic Coast Line Railroad Company.

Given under my hand and seal of said Court at office in Raleigh on this the — day of January, 1914.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 24,045. North Carolina Supreme Court. Term No. 353. The Atlantic Coast Line Railroad Company, plaintiff in error, vs. General Burnette. Filed February 4th, 1914. File No. 24,045.

Office Supreme Court, U. S.
FILED
NOV 2 1915
JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 66.

THE ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

GENERAL BURNETTE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

P. S. SPRUILL,
FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiff in Error.

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and engaged in the performance of his duties on the 5th day of October, 1907, suffered personal injuries which constitute the basis of the suit (R., 8).

January 8, 1910, Burnette commenced the suit by summons which was served on the company January 11, 1910 (R., 8). In February, 1910, he filed his complaint, outlining the circumstances attending the occurrence complained of and demanded $7,000 damages (R., 8, 9).

The company, by way of answer, admitted the employment, the occurrence, and the injury, but defended against the claim for damages on the ground of plaintiff's membership in its "Relief Department," and the election by him after injury suffered to receive benefits from said department, followed by the payment to and acceptance by him of such benefits until adjudged by the surgical staff of said "Relief Department" to be well and capable of returning to work, whereby "a full settlement and satisfaction of and for any and all such claim or claims against said defendant" had been accomplished (R., 12, 14).

On the trial, which was to the court and a jury, the company admitted its negligence, and the plaintiff admitted "all and each of said (the) allegations of fact contained in defendant company's further answer," but contended that the contract set up therein was invalid as matter of law (R., 15).

It was agreed "in open court" that the single issue, to wit: "What damage has plaintiff sustained on account of injuries received as alleged in the complaint" should be submitted to the jury, but judgment on the verdict when rendered should be withheld pending further hearing "upon the defences set up and made in defendant's further answer" (R., 15).

The jury, answering "the issue submitted to it as above set forth," returned its verdict for plaintiff in the sum of $1,000 (R., 15).

Further argument of the defenses set up and claimed having been had (R., 15) the trial judge, first stating that the verdict of the jury was not understood by him to "determine the matter other than to find the negligent act and the amount of damages, if any, which were recoverable," and that upon the argument before him "the plaintiff insisted upon the rendition of a judgment in his favor, both under the acts of Congress as well as under the State law," while the "defendant insisted that the Federal statutes were not applicable, and that it was entitled to judgment under the decision of King *vs.* Railroad, 157 North Carolina, 44, and other decided cases" (R., 17), ruled against the contentions of plaintiff and held, upon the authority of the King case, that the facts set up in the further answer and admitted by plaintiff "estopped and precluded (him) from a recovery against defendant in this action" (R., 17).

From this judgment plaintiff appealed to the Supreme Court of the State (R., 17) excepting to the refusal of the trial court to enter judgment in his favor for $1,000 (R., 18).

The State Supreme Court after argument (R., 20), held (163 North Carolina, 186) that the case of King *vs.* Railroad, 157 N. C., 44, had no application, because it was decided under the principles of the common law, and this case is governed by the Federal statute (R., 24); that "It is settled beyond controversy by the decisions of the Supreme Court of the United States that the acceptance of benefits from a relief deparment does not prevent a recovery of damages for negligence under the Employers' Liability Act of 1908 (Chicago R. R. *vs.* McGuire, 219 U. S., 549; R. R. *vs.* Schubert, 224 U. S., 603), and as it is admitted that the (that)

act is applicable to this case the *only question presented by the appeal is the construction of sec. 6 thereof, which reads as follows:* 'That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued' " (R., 22).

No plea of limitation based on plaintiff's failure to commence his action "within two years from the day the cause of action accrued" had been interposed by the defendant company and the State Supreme Court stated the controlling issue thus:

> "If this is a statute of limitation the defendant cannot avail itself of its protection, because of its failure to plead the statute, which is required both under our (State) Revisal, sec. 360, and under the general law (Wood on Limitations, vol. 1, sec. 7), and, on the other hand, if it is a condition inherent in and annexed to the right of action, the defendant was not required to plead it, and it would operate to defeat the plaintiff's action, which was commenced more than two years after the cause of action accrued" (R., 22).
>
> * * * * * * *
>
> "We must then examine the Act of Congress, and after considering its purpose, the subject with which it deals, the language used, and its effect, determine the legal operation of section six" (R., 22).
>
> * * * * * * *
>
> "After full consideration we are of opinion that the sixth section of the Employers' Liability Act is a statute of limitations, and that there is error."
>
> "The plaintiff is entitled to judgment upon the verdict for the amount of damages awarded, less $97.00 received by him from the relief department, which the statute says must be deducted" (R., 24).

Pursuant to the State practice it was adjudged that the opinion of the State Supreme Court "be certified to the said Superior Court to the intent that proceedings be had therein in said cause according to law" (R., 25).

Thereupon this writ of error was sought and allowed (R., 5) upon the following errors assigned (R., 3), to wit:

Assignment of Error.

(1.)

The Supreme Court of North Carolina erred in ruling that the "Employers' Liability Act of 1908," as amended was properly so applicable in the case as to permit a recovery by plaintiff, the cause of action having arisen on October 5, 1907, and the suit not having been commenced for more than two years thereafter.

(2.)

The Supreme Court of the State of North Carolina erred in construing section 6 of the "Employers' Liability Act of 1908," as amended, to be a statute of limitations, which, to be availed of, must be pleaded, whereas, in truth, such section 6 constitutes a condition inhering in and annexed to the rights of action conferred by the statute, which if not fulfilled, operates of its own force, and without having been pleaded to bar recovery.

Chronology.

1906, June 11, First Employers' Liability Act, approved (34 Stats., 232).

1907, October 5, Plaintiff Burnette received the injuries complained of.

1908, January 6, First Employers' Liability Act declared invalid (207 U. S., 463).

1908, April 22, Second Employers' Liability Act approved (35 Stats., 65).

1910, January 7, Suit commenced by issuing summons.

1912, January 15, Second Employers' Liability Act declared valid (223 U. S., 1).

ARGUMENT.

Jurisdiction.

The jurisdiction of the State courts in the premises is not questioned and could not successfully have been attacked. Act of August 13, 1888, 25 Stat. 434 ~~Sec. 6 of Act of April 22, 1908 (35 Stats., 65).~~

Second Employers' Liability cases, 223 U. S., 1, 56

The jurisdiction of this court to review the judgment of the State Supreme Court is likewise entirely clear.

Southern Railway Co. *vs.* Crockett, 234 U. S., 725, and cases cited at page 730.

St. Louis, I. M. & S. Ry. Co. *vs.* Hesterly, 228 U. S., 702.

Whether the failure of the defendant to plead the provision of section 6, viz., "No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued," in bar of the action operated in plaintiff's favor so as to permit a recovery, involves in typical form and in its very essence the existence under the Federal Statute of the right claimed by plaintiff and denied by defendant. The right to immunity set up and claimed by defendant under what he esteems to be the correct construction of said section 6 was denied by the State Supreme Court. Such denial is reviewable here "because inherently involving the operation and effect of the Federal law."

St. Louis, I. M. & S. Ry. Co. *vs.* McWhirter, 229 U. S., 265.

Merits.

This action might have been brought under the First Employers' Liability Act, but it was not commenced until somewhat more than two years after that act had been declared invalid.

It was brought, or at least the parties and the State Supreme Court all seemingly understood it to have been brought, under the Second Employers' Liability Act of 1908, and it is stated in the opinion of that court (delivered September 24, 1913) that it was admitted "that that act is applicable to this case" (R., 20, 22).

But the cause of action as alleged accrued October 5, 1907, while the act was approved April 22, 1908, and this court, in Winfree, administrator of Phipps, *vs.* Northern Pacific Railway Company, 227 U. S., 296; s. c., 44 L. R. A. (N. S.), 841, with elaborate note (decided February 24, 1913), had already declared (quoting the Circuit Court of Appeals for the Ninth Circuit) that this act

> "'is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred.' Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law."

The judgment of the Circuit Court of Appeals in that case had affirmed a judgment of the trial court which had sustained a demurrer to the plaintiff's declaration "on the ground, among others, that the act of Congress upon which plaintiff relied was passed, approved, and became a law after plaintiff's alleged cause of action accrued and imposed no liability, therefore, on defendant by reason of the facts set forth in the complaint," and the propriety of such action of the lower courts was confirmed by the judgment of this.

On the strength of this case it would seem that either on motion or on demurrer the declaration herein should have been dismissed.

The provisions of the act not being imbued with retrospective faculties, omission to call attention to its limitations

could not operate to confer jurisdiction upon any court to extend the scope of its benefices.

See also

Union Pac. R. R. Co. *vs.* Laramie Stock Yards Co., 231 U. S., 190, 197.

But if the admission made in open court that the act "is applicable to this case" be supposed in some manner to estop the plaintiff in error to so contend at this stage of the controversy, we return to and rely upon our assignments of error, which, in view of the characterization of the qualities of this act as above quoted, serve to turn the argumentation of the learned State Supreme Court in such wise as to compel the reversal of the judgment which it produced.

In Central Vermont Railway *vs.* White, 238 U. S., 507, 511, this court, speaking through Mr. Justice Lamar, said:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. McNiel *vs.* Holbrook, 12 Pet., 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time *not only bars the remedy but destroys the liability*. Phillips *vs.* Grand Trunk Ry., 236 U. S., 662; Boyd *vs.* Clark, 8 Fed., 849; Hallowell *vs.* Horwick, 14 Mass., 188; Cooper *vs.* Lyons, 77 Tenn., 597 (2); Nemcombe *vs.* Steamboat Co., 3 Iowa, 295. In that class of cases the law of jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a State which gave a longer period within which to sue."

In considering the provision of the Interstate Commerce law, that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, *and not after*," this court, applying the principle stated, had already said (Phillips *vs.* Grand Trunk Ry., 236 U. S., 662, 666-7):

> "It is argued, however, that under the Conformity act (R. S., 914), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (Finn *vs.* United States, 123 U. S., 227, 232), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction * * *. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action."

It would seem that the prohibition involved in the clause "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued," equally with that involved in the clause under consideration in the Phillips Co. case (next above), indicates the purpose of the Congress "to prevent suits on delayed claims" and likewise "not only bars the remedy but destroys the liability."

Morrison *vs.* Baltimore & Ohio R. R. Co., 40 Apps. D. C., 391, is in point here.

There the plaintiff Morrison, while engaged in or about interstate commerce as an employee of the Baltimore & Ohio Railroad Company, was injured February 9, 1907. On June 24, 1908, he filed suit, but did not by direct claim or by implication rely upon either the Employers' Liability

Act of 1906 or 1908. Defendant pleaded in bar the acceptance of relief benefits. Demurrer by plaintiff to such pleas having been sustained, plaintiff in November, 1911, filed an amended declaration expressly counting upon both the Employers' Liability Act of 1906 and 1908. To this demurrer was interposed and sustained on the ground, "first, that no action could be maintained under said act of 1906 unless commenced within one year from the time it accrued, and, second, that the act of 1908, extending such time to two years, is not retroactive" (p. 393).

In arguing the point the Court of Appeals of the District of Columbia, speaking through Robb, J., said:

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(P. 394:)

> "The act in question creates a liability where none existed, and takes away defenses formerly available. Coupled with this enlargement of the liability of common carriers is the limitation that no action shall be maintained under the act 'unless commenced within one year from the time the cause of action accrued.' The ordinary statute of limitations confers upon a defendant the privilege of interposing a definite limitation of time as a bar to the enforcement of a liability existing independently of the statute defining the limitation.

(P. 395:)

> "Such statutes, therefore, are merely limitations of the remedy. Statutes like the present are more. They create a right of action conditioned upon its enforcement within the prescribed period. The legislature, having the power to create the right, may affix the conditions under which it is to be enforced, and a compliance with those conditions is essential. 'The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone.. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the

remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right.' The Harrisburg, 119 U. S., 214; 30 L. Ed., 362; 7 Sup. Ct. Rep., 140. See also Walsh *vs.* Mayer, 111 U. S., 37; 28 L. Ed., 340. It is therefore necessary for one seeking to enforce a right under such a statute to state a case within it, and time is of the essence of the right. Had plaintiff's suit been filed *within* the statutory period, it would have been no more necessary to have referred to the act than to any other statute of the forum. Missouri, K. & T. R. Co. *vs.* Wulf, 226 U. S., 570, 575; 57 L. Ed., —; Morrisey *vs.* Hughes, 65 Vt., 553; 27 Atl., 205. An averment of facts bringing the case within the statute would have been sufficient. As a reading of the original declaration discloses that the suit was not filed within the statutory period, it must be presumed that the action was based upon the common law. In the amended declaration filed November 25, 1911, plaintiff relied upon the employers' liability acts of 1906 and 1908, but he did not allege any reason for his failure to bring his suit within the statutory period. This amendment was filed more than four years after the accident.

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(P. 396:)

"Unlike the rule applicable to a defense based upon an ordinary statute of limitation, which requires the defendant to plead the statute, that the plaintiff may have an opportunity of replying and pleading any matter which would prevent the running of the statute, the rule applicable to statutes creating a conditional right of action permits the defendant to interpose a demurrer where, upon an inspection of the pleadings, it is apparent that a case within the statute has not been stated. Lumber *vs.* Ensign Mfg. Co., 42 W. Va., 813; 26 S. E., 431; Bretthauer *vs.* Jacobson, 79 N. J. L., 223; 75 Atl., 560; Poff *vs.* New England Teleph. & Teleg. Co., 72 N. H., 164; 55 Atl., 891; Trull *vs.* Seaboard Air Line R. Co., 151 N. C., 545; 66 S. E., 586; Dowell *vs.* Cox, 108 Va., 460; 62 S. E., 272; Hanna *vs.* Jeffersonville R. Co., 32 Ind.,

113; Hill *vs.* Rensselaer County, 119 N. Y., 344; 23 N. E., 921; Kavanagh *vs.* Folsom, 181 Fed., 401; Callan *vs.* Bodine, 81 N. J. L., 240; 79 Atl., 1057."

This is substantially the view of the Scottish tribunals expressed in Johnston *vs.* Shaw, 21 Sc. L. R., 246, where, in enforcing the Scots Employers' Liability Act, it is said that the limitation therein specified is for the protection of defendants just as the operative provisions of the law are for the benefit and protection of plaintiffs, and both should be enforced with equal strictness.

An elaborate and interesting discussion of this point will be found in Rodman *vs.* Missouri Pacific R. Co., 65 Kansas, 645; s. c., 59 L. R. A. (O. S.), 704, 706.

Upon the whole case it is submitted that the judgment of the Supreme Court of North Carolina should be reversed and the cause remanded with instructions for further proceedings.

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